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No. 05-1363

IN THE
Supreme Court of the United States

W.R. GRACE & CO., KOOTENAI DEVELOPMENT CORPORATION, AND W.R. GRACE & CO.-CONN.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

KATHERYN J. COGGON
HOLME ROBERTS & OWEN LLP
1700 Lincoln St.
Denver, CO 80203

CHRISTOPHER LANDAU
Counsel of Record
JOHN C. O'QUINN
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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ARGUMENT

The Government contends, at the most basic level, that "Grace has had its day in court" to challenge the EPA's unprecedented CERCLA response action in Libby, Montana. Opp. 13 (internal quotation omitted). That contention is manifestly incorrect, and that is the heart of the problem.

The issue here is not whether the EPA *could* have conducted a CERCLA removal action in Libby. Rather, the issue here is whether the EPA *actually* conducted a CERCLA removal action in Libby. CERCLA generally caps EPA "removal" actions at $2 million or 12 months; the agency has now spent more than $120 million in Libby over more than six years. In CERCLA terms, this is a classic "remedial," as opposed to "removal," action: the EPA did not simply act to contain or abate an immediate environmental hazard, but avowedly sought to restore the Libby site to its original condition. The agency is certainly entitled to carry out such long-term remedial activity, but is not entitled to recover the cost of such activity from Grace without first observing the requisite procedural safeguards, including consideration of cost and cost-effectiveness. This the agency has steadfastly refused to do. So now, in order to recover its extravagant expenditures, the agency is forced to pretend that the entire Libby response action is not only a "removal" action but an "emergency" removal action exempt from the statutory caps.

Both the district court and the Ninth Circuit allowed the EPA to get away with this pretense, and awarded the agency every penny expended in Libby through the end of 2001 (as well as a declaratory judgment regarding Grace's liability for future costs). In making that decision, however, neither court considered the full scope of the agency's activities in Libby, or analyzed whether those activities were necessary to contain or abate an immediate environmental hazard. *See* Pet. App. 41-42a;

60a. These courts thus distorted the relevant legal inquiry: as both the Eighth and Tenth Circuits have recognized, courts cannot apply CERCLA's bedrock removal/remedial distinction without considering the full scope of the response activities at a given site, or the nexus between those activities and the containment or abatement of an immediate environmental hazard. *See Minnesota v. Kalman W. Abrams Metals, Inc.*, 155 F.3d 1019, 1024 (8th Cir. 1998); *Public Serv. Co. v. Gates Rubber Co.*, 175 F.3d 1177, 1181-82 (10th Cir. 1999). In particular, a response action cannot be characterized as a removal just because some *component* of the action, standing alone, might be characterized as a removal.

Thus, in *Abrams Metals* and *Gates Rubber*, both the Eighth and Tenth Circuits freely acknowledged that removal actions might have been warranted: the site in *Abrams Metals* was contaminated with hazardous lead, and the site in *Gates Rubber* was contaminated with hazardous lead and polychlorinated biphenyls (PCBs). *See* 155 F.3d at 1021; 175 F.3d at 1179. And both the Eighth and Tenth Circuits recognized that the CERCLA cost recovery plaintiffs in those cases had in fact "removed" the hazardous contaminants, so that their actions could be characterized at least in part as "removals." *See* 155 F.3d at 1024 (recognizing "the obvious fact that lead contaminants were 'removed' from the site"); 175 F.3d at 1184 (recognizing that the plaintiff "'removed' and 'excavated' soils and buried storage drums").

But, in sharp contrast to the Ninth Circuit below, neither the Eighth nor the Tenth Circuit stopped there. Rather, both the Eighth and the Tenth Circuits recognized that a given response action could not be characterized as a "removal," as opposed to "remedial," action without considering the full scope of the response activities and the nexus between those activities and the containment or abatement of an immediate environmental hazard. After such consideration, the

district courts in both cases granted the *defendants* summary judgment, holding that the disputed actions exceeded the scope of a removal as a matter of law. Both the Eighth and Tenth Circuits affirmed on this score, although the Eighth Circuit remanded to give the plaintiff a chance to show that particular actions complied with CERCLA's procedural safeguards for remedial actions.

The Government's efforts to reconcile these decisions with the Ninth Circuit's decision below, *see* Opp. 16-18, are unavailing. The Government first argues that these courts "did not hold that the response action should be divided, as Grace advocates here, into a line-item determination of whether each separate activity constitutes a removal or remedial action." *Id.* at 16; *see also id.* at 18 ("The court did not rule that an item-by-item analysis should be conducted in distinguishing between removal and remedial actions."). But that argument is based on a manifest distortion of Grace's position. Grace does not contend that every individual activity at a site should be viewed as a separate removal or remedial action. Rather, Grace's point is that (as both the Eighth and Tenth Circuits recognized, but the Ninth Circuit did not) an overall response action cannot be characterized as a removal simply because some component of that action, standing alone, might be characterized as a removal. *See, e.g.*, *Abrams Metals*, 155 F.3d at 1024; *Gates Rubber*, 175 F.3d at 1183-84. A court must examine the totality of the response activities and analyze the nexus between those activities and the containment or abatement of an immediate environmental hazard.

The Government thus misses the point by further seeking to distinguish *Abrams Metals* and *Gates Rubber* on the ground that "the factual circumstances [of those cases] differ substantially" from this case. Opp. 17. The problem here is that no court has ever considered the full scope of the EPA's response activities in Libby, or analyzed whether those activities were necessary to

contain or abate an immediate environmental hazard. The district court, after all, granted the Government *summary judgment* on the ground that the EPA had "considered" the factors relevant to undertaking a removal action. Pet. App. 60a. And the Ninth Circuit affirmed on the ground that at least some of the actions undertaken by the EPA in Libby were necessary to contain or abate an immediate environmental hazard. *See* Pet. App. 41-42a. Thus, no court has ever analyzed whether the myriad remedial activities cited by Grace—including substantial soil excavation and replacement, reforestation, erosion prevention measures, and even buying a new public announcement system and popcorn machine for the high school, *see* Pet. App. 163-69a; *see also* C.A. App. ER1653-57—were necessary to contain or abate an immediate environmental hazard. To say, as the Government does (and as the Ninth Circuit did) that the "EPA's characterization of the Libby response as a removal 'is amply supported by the administrative record,'" Opp. 19 (quoting Pet. App. 42a) makes no sense, because the administrative record addressed whether a removal action was warranted in the first instance, not whether a removal action was ultimately conducted.

Indeed, as noted in the petition, "the EPA has never claimed, and neither the district court nor the Ninth Circuit ever determined, that all (or even a majority, or a substantial portion) of the costs at issue were necessary to contain or abate an immediate environmental hazard (as opposed to permanently remediate the site)." Pet. 16. The Government cannot, and does not, dispute that point in its opposition brief. That should be the end of the matter. Without considering the full range of the EPA's response activities in Libby, and the nexus between those activities and the containment or abatement of an immediate environmental hazard, a court cannot possibly determine that the Libby response action is a removal, as opposed to remedial, action. That is what Grace means

when it says that it has never had its day in court on this score.

The Government's assertion that Grace had "extensive opportunities ... to convince the district court and the court of appeals that EPA's response activities did not constitute a removal action" is thus inexplicable. Opp. 16 n.5; *see also id.* ("The district court and the court of appeals carefully considered the arguments that Grace made and properly rejected them."). What the district court and the Ninth Circuit rejected was Grace's *legal* argument that a court cannot apply CERCLA's removal/remedial distinction without considering the full scope of the response activities and the nexus between those activities and the containment or abatement of an immediate environmental hazard. That is the legal issue now presented to this Court. Because the lower courts here erred *as a matter of law* by limiting the relevant inquiry under CERCLA, the Government cannot hide behind those courts' ultimate conclusions.

It follows that the Government errs by asserting that "the question of what activities in this case are properly part of the removal action is a factbound matter of no consequence beyond the confines of this particular cost recovery suit." Opp. 15. The question presented here is not "what activities ... are properly part of the removal action." *Id.* Rather, this case presents the legal question whether, as the Ninth Circuit concluded, an entire CERCLA response action may be characterized as a removal action if *any portion* of that action may be characterized as a removal action. *See* Pet. App. 11a n.9; 23a; 41-42a. That is not a factbound question, but a fundamental legal question regarding the proper judicial role in applying CERCLA's removal/remedial distinction.

Indeed, it is hard to overstate the practical and legal consequences of the decision below. As the Government concedes, CERCLA's cost-recovery mechanism creates a ""sweeping"" remedy for environmental contamination.

Opp. 2 (quoting *United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998) (in turn quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989)). Precisely because of the breadth of that remedy, Congress crafted a careful scheme of checks and balances: removal actions are limited in scope and duration, and hence require only limited procedural safeguards, whereas remedial actions are unlimited in scope and duration, and hence require substantial procedural safeguards. What a CERCLA plaintiff cannot do is spend money indefinitely and at will to remediate a site, without considering the cost or cost-effectiveness of its actions, and then present a CERCLA defendant with the bill. But that is precisely what the EPA is trying to do here: if an action that has cost more than $120 million and has taken more than six years is not a remedial action, it is hard to know what would be.

But again, Grace is not asking this Court to decide in the first instance that the Libby response action is a remedial action. Rather, Grace is asking this Court only to decide that courts cannot characterize a response action as a removal action without considering the full scope of the response activities and the nexus between those activities and the containment or abatement of an immediate environmental hazard. The lower courts here erred as a matter of law, and fundamentally distorted the statutory scheme, by artificially limiting the scope of judicial inquiry in applying the removal/remedial distinction. Indeed, because every remedial action will include a removal component (the permanent remediation of a site logically entails the removal or abatement of the immediate hazard), the lower courts' approach here essentially obliterates the removal/remedial distinction and nullifies the extensive procedural safeguards for remedial actions. Again, this case proves the point: the lower courts here upheld the EPA's characterization of the entire Libby response action as a removal action without considering the extensive remedial activities cited by Grace, *see* Pet. App. 41-42a, 60a—the very

activities that have made this ongoing response action cost more than $120 million and last more than six years without any consideration of cost or cost-effectiveness. The lower courts here, in short, delivered the EPA the very blank check that CERCLA's removal/remedial distinction was designed to avoid.

The Government seems to believe that it is freed from all statutory or regulatory constraints by simply declaring that the people of Libby face "'ongoing, pervasive exposure to asbestos particles being released through documented exposure pathways,'" and "'people are sick and dying as a result of this continuing exposure.'" Opp. 6-7 (quoting Pet. App. 4a). But that is the very issue in dispute. Grace contests this point, and in fact believes that the EPA's own actions in Libby belie the point: the EPA never evacuated a single person from the town, has always reassured the residents that there is no imminent health threat, and has taken its time in carrying out the ongoing response action. *See generally* Pet. App. 139-84a. Because the district court granted summary judgment against Grace and the Ninth Circuit affirmed, no court has ever resolved these factual disputes. Notwithstanding the summary judgment posture of the case, the lower courts here simply accepted the EPA's assertions at face value without considering the remedial activities cited by Grace. *See id.*

In the final analysis, thus, the decisions below rely on nothing more than the Government's say-so in ordering Grace to pay every penny expended by the EPA in Libby without any consideration of cost or cost-effectiveness. But one of the reasons that we have courts in this country is to defend against just this risk of arbitrariness in the execution of the laws. *See, e.g., Hurtado v. California*, 110 U.S. 516, 527 (1884). All Grace requests here is a judicial forum to make its case that the EPA's extensive response activities in Libby were not remotely geared to containing or abating an immediate environmental hazard, as opposed to permanently remediating the site.

There is nothing "unique" or "truly extraordinary" about that request, Opp. 12 (internal quotation omitted); if the EPA is right about the nature of the threat, then it should be able to counter Grace on the merits. The key point here is that the EPA has never been put to the test.

Whether or not a CERCLA plaintiff should be put to the test before being allowed to recover costs from a CERCLA defendant most certainly is a "recurring issue of national importance." Opp. 12. CERCLA is one of the Nation's signal environmental laws, and the question presented here implicates potentially billions of dollars in future CERCLA response costs. The Ninth Circuit has now interpreted the statute to allow a CERCLA plaintiff to force a CERCLA defendant to pay for a response action of indefinite scope and duration, undertaken without consideration of cost or cost-effectiveness, with no meaningful judicial review. If that ruling is allowed to stand, CERCLA's removal/remedial distinction is a dead letter, and CERCLA plaintiffs have no incentive to spend (other people's) money in a restrained or rational manner. Because the ruling below conflicts not only with rulings by the Eighth and Tenth Circuits, but with the very rule of law, this Court's review is warranted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

KATHERYN J. COGGON
HOLME ROBERTS & OWEN LLP
1700 Lincoln St.
Denver, CO 80203

CHRISTOPHER LANDAU
Counsel of Record
JOHN C. O'QUINN
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000